# Supporting Document No. 3

Item No. 8
April 9, 2003

JM 1/7/03
Phil H 1/6/03

*Exempt from Filing Fees*
*Pursuant to Cal Gov Code § 6103*

JAMES P. LOUGH (#91198)
McDOUGAL, LOVE, ECKIS, SMITH & BOEHMER
460 North Magnolia Avenue, Drawer 1466
El Cajon, California 92020-1466
Tel: (619) 440-4444

Attorneys for Real Parties in Interest,
CITY OF CHULA VISTA, CITY OF CORONADO
CITY OF DEL MAR, CITY OF EL CAJON,
CITY OF IMPERIAL BEACH, CITY OF POWAY,
AND CITY OF SOLANA BEACH

RONALD R. BALL (#74105)
1200 Carlsbad Village Drive
Carlsbad, CA 92008
Tel: (760) 434-2891

Attorney for Real Party in Interest,
CITY OF CARLSBAD

JOHN J. SANSONE, County Counsel
County of San Diego
By RODNEY F. LORANG, Senior Deputy (SBN 93078)
1600 Pacific Highway, Room 355
San Diego, CA 92101
Tel: (619) 531-4884

Attorney for Real Party in Interest, COUNTY OF SAN DIEGO

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO**

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, etc., et al.,

Petitioners and Plaintiffs,

v.

STATE WATER RESOURCES CONTROL BOARD, et al.,

Respondents and Defendants.

CASE NO: GIC 780263
Complaint filed: December 21, 2001

**OPENING BRIEF OF THE CITIES OF CARLSBAD, CHULA VISTA, CORONADO, DEL MAR, EL CAJON, IMPERIAL BEACH, POWAY, SOLANA BEACH, AND THE COUNTY OF SAN DIEGO**

Date: February 10, 2003
Time: 9:00 a.m.
Dept: 75
Judge: Hon. Wayne Peterson

# TOPICAL INDEX

# TOPICAL INDEX

# TABLE OF AUTHORITIES

Page(s)

## Cases



## Statutes

Federal

Code of Federal Regulations



United States Code

# TABLE OF AUTHORITIES

Page(s)

## Statutes (cont'd)

# TABLE OF AUTHORITIES

COMES NOW, Real Parties in Interest CITIES OF CARLSBAD, CHULA VISTA, CORONADO, DEL MAR, EL CAJON, IMPERIAL BEACH, POWAY, SOLANA BEACH, and THE COUNTY OF SAN DIEGO (collectively "Responding Copermittees"), who file this joint brief in response to Petitioners' Opening Brief as follows:

## I.

## INTRODUCTION

This brief was prepared at the request of the San Diego County City Attorneys Association, to be filed on behalf of those Real Parties in Interest that chose to participate. Responding Copermittees participated in preparing this brief. Other cities may join this brief on any or all issues if they so choose.

### A. Local Implementation of the Municipal Stormwater Permit

NPDES Permit No. CAS0108758, issued by the California Regional Water Quality Control Board San Diego Regional ("Regional Board") on February 21, 2001, [1] applies to discharges of urban runoff from the storm sewer systems draining the watersheds of the County of San Diego, the 18 incorporated cities within the county, and the San Diego Unified Port District. Each of these jurisdictions collects and channels storm water and non-stormwater flows that enter their collection systems. By law, these jurisdictions are the regulated "dischargers" of these flows, regardless of the actual sources of the water or of the pollutants these discharges may contain. Therefore, by law, these jurisdictions must have a federally recognized and federally enforceable National Pollutant Discharge Elimination System (NPDES) permit for those discharges. Pursuant to a federal delegation and state law, the permit issued by the Regional Board, and subsequently modified by the State Water Resources Control Board (State Board) is that permit.

Responding Copermittees are committed to improving water quality and to protecting water-dependent environmental resources in San Diego County. We recognize that polluted

[1] Unmodified references to the "permit" herein are to this permit.

water is a threat to health and safety, a drag on economic prosperity, and a cause of environmental degradation, whether the pollution affects inland creeks and streams, coastal lagoons, or beaches. We recognize that local governments can contribute to improved water quality with better land use planning, focused local regulatory programs, and by setting a good example for the private sector. We acknowledge that the permit is a key tool for improving water quality in San Diego. Without exception, we are working diligently to implement that permit and to achieve cleaner water.

This brief does not argue that any terms of the permit are invalid, though we have concerns about the permit and have expressed them in the past. Instead, this brief is confined to identifying and addressing some key implementation issues that will arise if this Court vacates, modifies or remands all or part of the permit. As dischargers, Copermittees, and local governments, we must cope the results of this litigation. We will implement this permit, or any successor permit that may issue after this litigation is concluded. But between now and then, some transitional issues must be addressed.

**B. Background, and Issues Not Addressed in this Brief**

As the record before this Court shows, the terms of this permit have been the subject of contentious debate. The Regional Board staff draft of this permit released for comment in October 2000 led to the submission of hundreds of pages of comments. The staff draft permit was significantly amended in response to these comments before a final permit was promulgated. However, some concerns raised by the County and various cities were rejected. This left Copermittees who were concerned about the terms of the final permit with a choice. They could appeal the permit to the State Board and the courts, devote staff time and resources to litigation, and risk enforcement action. Or, they could focus their resources on implementing local programs as mandated by the permit.

The 18 Copermittees named as Real Parties in this litigation chose the second option. They did not appeal the permit to the State Board, or to this Court. The principle focus of Responding Copermittees, as was true in 2001, continues to be on implementing programs in

a manner that will improve water quality and protect water-dependent resources.[2] For purposes of this litigation, we leave issues of permit validity under current federal and state law to Petitioners, Respondents, and the Court.[3]

**C. Issues Addressed in this Brief**

Petitioners have asked this Court to issue a writ that would, among other things, rescind the permit. The issuance of a writ either fully or partially invalidating the permit would raise issues affecting local government storm water discharges and storm water programs in San Diego County. Local jurisdictions cannot shut off the rain or plug their storm drains, but they cannot legally discharge storm water without an NPDES discharge permit. Therefore, Responding Copermittees ask, if the permit is rescinded or remanded in whole or in part, that the Court both provide a legal basis for continued stormwater discharges, and identify the terms applicable to those discharges during any transition period.

Responding Copermittees also request that the Court provide guidance on two other issues affecting potential permit revisions and permit implementation. First, if Petitioners' CEQA claims are upheld, we request direction from the Court on how responsibility for CEQA analysis should be allocated. We argue below that the lead agency for any required CEQA analysis should be the Regional Board, not the Copermittees.

Second, we request guidance from the Court on which sets of permit requirements are federally mandated, versus state-mandated. The Court will face this issue in the context of Petitioners claim that permit requirements that are not federally mandated are subject to CEQA. However, if it resolves that legal question with the answer urged by Petitioners, the Court might consider remanding the task of sorting out specific federal versus state mandate

---

[2] In the future, some Copermittees will likely seek a sounder state legislative basis for state and local governmental cooperation to pursue these goals.

[3] Responding Copermittees acknowledge that this Court has ruled that Real Parties may not oppose the permit on Water Code grounds, because they did not exhaust their administrative remedies.

distinctions to the Regional Board. We urge the Court to instead address this issue itself, at least for the four key areas identified in Section V of this brief.

This issue has implications that go beyond CEQA. The Court's rulings on mandate questions could affect the terms of any new permit. If the Court determines that some of these requirements are solely state mandates, an issue would arise as to whether the state was obliged to reimburse local governments for implementation costs. That issue could affect whether those requirements were again mandated in a revised permit. If the state-law-based requirements were retained in a revised permit, some Copermittees might also decide to pursue claims for reimbursement as provided by state law.

## II.

## THE COURT SHOULD PROVIDE THE PARTIES WITH CLEAR GUIDANCE CONCERNING THE PERMIT TERMS THAT ARE APPLICABLE DURING ANY TRANSITION PERIOD.

The Copermittees must discharge stormwater, and must have a permit to do so legally. Therefore, if the current Permit is rescinded or remanded in whole in part, the Court should provide for continued stormwater discharges, and should identify the terms applicable to those discharges during any transition period.

This could be done by identifying specific requirements in the current permit that have been set aside, leaving the rest of the permit in place. This would be workable. Alternatively, the Court could determine that the current permit may not stand at all, e.g., until the Regional Board completes the CEQA process. Rescinding the current permit would be workable only if the Court further provided for an alternative permit, e.g., by ruling that the prior Municipal Stormwater Permit for San Diego had been returned to force. The existence of some permit is critical: Without an NPDES permit allowing discharges of urban runoff, the Real Parties in Interest cannot legally operate their storm sewer systems. The specific terms of that permit are also important, as the Copermittees would need to know how they could adjust their stormwater programs pending further Regional Board or State Board action.

## III.

## ASSUMING RESPONDENTS' EXEMPTION FROM CEQA IS NOT APPLICABLE, RESPONDENTS MUST TAKE ON ALL DUTIES OF A LEAD AGENCY.

The Regional Board asserted in issuing the permit that compliance with the California Environmental Quality Act ("CEQA") was not required, because issuance of this permit was exempt from CEQA under Water Code § 13389 (Permit Finding 40). Petitioners assert that this exemption extends only to those NPDES permit requirements that are federally mandated, and not to permit requirements based on state law that go beyond federal mandates. (Petitioners' Opening Brief 21:12-24:9). If Petitioners are correct as to the law, then on the facts of this case CEQA compliance was required for a substantial part of this permit.[4] But the Regional Board made no attempt to comply with CEQA. It instead relied entirely on this contested exemption.

The eight cities filing this brief have previously filed Statements of Issues arising under CEQA, and assert that CEQA applies to portions of this permit that are not federally mandated. The County has not filed a Statement of Issues, and takes no position in this litigation as to whether or not the issuance of this permit was exempt from CEQA. Responding Copermittees jointly request that the Court identify the Regional Board as Lead Agency under CEQA, if the Court determines that CEQA is applicable to all of or portions of the permit.

If CEQA is applicable to this permit, complying with CEQA will not be a simple task. The permit applies countywide, and affects new land development, redevelopment, industrial activities, commercial facilities, municipal facilities, and residential areas. It affects surface water discharges, water flow rates and velocities, discharges to ground water, and

---

[4] Petitioners claim that Respondents concede that at least 40 percent of the requirements in the permit are not required by federal law. (Brief at 21:13-15, citing REBAR 669, SEAR 437.)

development project design. The Regional Board did not provide a CEQA-quality analysis of these issues for either the proposed or the final permit.[5] There was no analysis of how restrictions on fire fighter training could affect public safety, or of how prohibiting stormwater and non-stormwater discharges would affect water-dependent environmental resources. There was no analysis of potential impacts on ground water contamination or ground water levels in shallow groundwater basins from increased stormwater infiltration. There was no analysis of the potential impacts on open space resources of placing new burdens on in-fill redevelopment projects. There was no analysis of how development patterns could be affected by the need to find space for stormwater collection and treatment facilities. There was no analysis of alternatives to the permit mandate to intercept and treat runoff from new land development projects "close to pollution sources, where feasible."

In short, if CEQA were applied to the permit requirements the Regional Board imposed based on state law, more analysis of the potential environmental impacts of the permit, and of alternatives to key permit requirements, would likely be needed. Therefore, any remand to the Respondents' respective Boards requiring CEQA compliance may have a significant fiscal impact on the CEQA Lead Agency.

Although there are multiple public agencies involved in implementing the programs that are needed to comply with this permit, the CEQA guidelines are clear that the Lead Agency responsibility should fall upon the Respondent Regional Board.

Under CEQA guideline § 15051, if two or more public agencies are involved in a project, the following criteria governs Lead Agency determination as follows:

> (a) If the project will be carried out by a public agency, that agency shall be the Lead Agency even if the project would be located within the jurisdiction of another agency.

---

[5] The Copermittees have addressed CEQA in implementing specific programs required by the permit in each municipal jurisdiction. However, the discretionary decisions remaining at the local implementation stage of this process are greatly diminished.

> (b) If the project is to be carried out by a nongovernmental person or entity, the Lead Agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.
>
> (1) The Lead Agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.
>
> (2) Where a city prezones an area, the city will be the appropriate Lead Agency for any subsequent annexation of the area and should prepare the appropriate environmental document at the time of the prezoning. The Local Agency Formation Commission shall act as a Responsible Agency.
>
> (c) Where more than one public agency equally meet the criteria in subsection (b), the agency which will act first on the project in question shall be the Lead Agency.
>
> (d) Where the provision of subsections (a), (b), and (c) leave two or more public agencies with a substantial claim to the Lead Agency, the public agencies may by agreement designate an agency as the Lead Agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices. (14 Cal. Code Regs. § 15051.)

Under subsection (a), the guideline places Lead Agency responsibility upon the public agency that carries out the project even if the project is located in the jurisdiction of another public agency. In this instance, the project will be carried out in numerous jurisdictions. However, the Regional Water Quality Control Board issued the Permit. As the issuing agency, it has the primary responsibility of carrying out the project as defined in CEQA. (See also, Public Resources Code § 21165; Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist. (1994) 28 Cal.App.4th 419, 426.)

As Lead Agency, Respondent Regional Water Quality Control Board would be responsible for most decisions regarding the proper manner of complying with CEQA when it considers any reissuance of the Permit. (Public Resources Code § 21067; 14 Cal. Code Regs.

§ 15050.) Unless upon remand the Regional Board decides to proceed directly with an Environmental Impact Report (EIR), the Lead Agency's responsibility would be to conduct an initial study to determine whether the project may have a significant effect on the environment and whether to prepare an EIR, a Negative Declaration, or a Mitigated Negative Declaration for the project. (Public Resources Code §§ 21080(c), 21080.1; 14 Cal. Code Regs. § 15063.) Before making a determination of significant impact, the Lead Agency must consult with Responsible Agencies. (Public Resources Code § 21080.3.) This requirement would include consultation with the Copermittees, who would be Responsible Agencies under CEQA for this project.

As the agency responsible for issuing the Permit, the Regional Board would be in the best position to monitor any mitigation programs required under CEQA. (Public Resources Code § 21081.6.) The Responsible Agency that identifies potential significant impacts of the Permit would provide performance objectives and guidelines for mitigation of the identified impacts. (Public Resources Code § 21081.6(c).)

These mitigation measures and the monitoring programs established thereunder would then be subject to final approval by the Regional Board as Lead Agency. This approach is the most sensible for considering all environmental impacts of the whole project. As the Lead Agency, the Regional Board properly fills that role in that it has the broadest governmental powers over the project and therefore should be most responsible for the consideration of all environmental impacts of the Permit.

By contrast, the Responsible Agencies (Copermittees) should only be delegated with considering aspects of the project that are subject to their discretion and jurisdiction. This is of particular importance in the area of regional impacts within watersheds, which lie in several jurisdictions. To place responsibilities directly on the Copermittees would result in a piecemeal approach to otherwise regional environmental impacts. CEQA requires the Responsible Agency to respond to requests for information from the Lead Agency. (14 Cal. Code Regs. § 15096.) This consultation process requires, both as a matter of practicality and as a matter of law, that the Regional Board take on the responsibility of determination of all

environmental impacts arising out of the Permit that it issues and coordinating local environmental issues into a single document. Once that determination is made, the Responsible Agencies are bound by the Lead Agency's decision on whether to prepare an EIR, a Mitigated Negative Declaration, or Negative Declaration. (Public Resources Code § 21080.1; 14 Cal. Code Regs. § 15050(c); City of Redding v. Shasta County LAFCO (1989) 209 Cal.App.3d 1169.)

In conclusion, if the CEQA exemption used by Respondents is not applicable or does not apply to all of the requirements in this permit, this matter should be remanded to the State and Regional Board to follow the requirements of the California Environmental Quality Act. In doing so, it is requested that this Court designate the Regional Board as the Lead Agency with all responsibilities for implementing CEQA. As Responsible Agencies, the Real Parties in Interest will cooperate with the Regional Board in determining what environmental impacts are significant and require appropriate study under CEQA. Also, as part of this process, the Responsible Agencies will make recommendations on mitigation monitoring programs for areas within their jurisdiction. As Lead Agency, any remand must include language that requires the Regional Board to consult with the Responsible Agencies regarding the existence of environmental impacts and how to deal with those impacts. Finally, the Regional Board must be directed to take steps to fund the environmental work it is required to do under CEQA. Public Resources Code § 21106 requires the State to budget funds related to protection of the environment. This section states as follows:

> All state agencies, boards, and commissions shall request in their budgets the funds necessary to protect the environment in relation to problems caused by their activities. (Public Resources Code § 21106.)

The finding of this Court that environmental impacts must be assessed should place the fiscal responsibility where it belongs for a regional program issued by a State Board. This section places a mandatory duty on the Regional Board to seek necessary funding related to environmental impacts caused by issuance of the Permit. The issue of this environmental protection requirement should include financial obligations necessary in the preparation of

environmental documentation required by the Public Resources Code. A regional Environmental Impact Report or other environmental documentation issued by the State Board would necessarily fall under this section. Therefore, any remand should include a requirement that the Respondents fulfill their obligations under Public Resources Code § 21106.

## IV.

## THE DESIGNATION OF STATE MANDATED OBLIGATIONS UNDER THE PERMIT BY THIS COURT WOULD CLARIFY ENVIRONMENTAL AND FINANCIAL ROLES OF THE REAL PARTIES IN INTEREST AND RESPONDENTS.

### A. The issuance of a Writ on CEQA grounds would have significant financial implications to local governments subject to the Permit.

As discussed above, the Petitioners have challenged the CEQA exemption in Water Code § 13389. According to Petitioners this issue hinges on whether or not this Court finds that conditions in the Permit are based on State regulatory authority rather than federal authority under the Clean Water Act. This issue has greater significance to the citizens of San Diego County than solely whether an environmental document need be prepared. In addition to the cost of environmental compliance, this issue may determine which level of government is required to pay for new regional programs established by the Permit.[6] That determination could in turn affect whether some requirements are retained in a revised permit—the state may choose not to exceed federal mandates in some area, if there is a risk the state would be required to reimburse local government costs to implement those extra requirements.

---

[6] As discussed below, the process for sorting out who must pay these costs is claims-driven and litigious. Some Copermittees may chose not to assert claims for state reimbursement, even if the ruling of this Court provides some support for such claims. The County, for example, believes it may be more productive to seek state legislation to ensure that money is well spent, than to seek a ruling requiring the state to reimburse local governments for programs that are not cost effective.

As an example, the City of Carlsbad has budgeted $1,873,190 for its fiscal year 2001-2002 storm water protection program in order to comply with the Permit.[7] The cost of implementing this Permit will be significant to all of the Real Parties in Interest.

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State must provide a sufficient amount of funds to reimburse local government for the cost of the program or the increased level of service. (Const. Art. XIIIB, § 6.) This requirement was enacted as part of Proposition 4 in 1979 and became effective on July 1, 1980 (see, i.e., Los Angeles Unified School District v. State of California (1991) 229 Cal.App.3d 552) (regarding reimbursability of costs incurred to comply with certain Cal OSHA regulations)).

The purpose of this State initiative was to preclude the State from shifting financial responsibility for carrying out governmental functions on to local entities that are ill equipped to handle the task. (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487.) The Legislature has implemented this constitutional mandate with certain exceptions. One of those exceptions is for a statute or executive order that implements federal law, unless the statute or order mandates costs that exceed the mandate in federal law. (Government Code § 17556.) The exception for federal programs applies not only to direct federal mandates but also to programs that are technically voluntary but coercive in nature, which the State passes on to local governments. (City of Sacramento v. State of California (1990) 50 Cal.3d 51 (unemployment insurance).)

The Permit subject to this action was issued by a State administrative agency, the Regional Board (Water Code § 13200 et seq.). It is part of the Executive Branch of State government with its membership appointed by the Governor (Water Code § 13201(a)). Its

---

[7] Responding Copermittees request that the Court take judicial notice of the official budget document of the City of Carlsbad. Page B-23 of the "City of Carlsbad 2001-02 Operating Budget and Capital Improvement program" is attached hereto as Exhibit "A". As the adopted Budget of the City of Carlsbad, it is a legislative enactment of a public entity in the United States (Evidence Code § 452(b)).

executive orders are the type of regulation subject to potential reimbursement under the State Mandates program (see, Carmel Valley Fire Protective District v. State of California (1987) 190 Cal.App.3d 521).

The issuance of the Permit by the Regional Board was founded upon a CEQA exemption that claimed the entire Permit was federally mandated. (Permit Finding 40.) The ability of the Copermittees to seek cost reimbursement will be directly affected by the Court's determination on the CEQA issue. Whether the Copermittees actually receive reimbursement will be subject to the jurisdiction of the Commission on State Mandates and not this Court. (Cal. Const. Art. XIIIB, § 6; Government Code § 17500 et seq.)

If some local governments file claims, the Commission on State Mandates will be required to determine the applicability of an exception to this reimbursement obligation for expenses that can be recovered from sources other than taxes. (County of Fresno, supra, 53 Cal.3d 482.) In other words, if a fee can be charged by the local legislative body to pay for the costs, a State reimbursement obligation does not exist. Here, the cost of a storm water permit program may not be funded exclusively through fees. In the only case on the subject to date, it has been held that, absent voter approval, a city cannot establish a general fee program to pay for costs to produce or eliminate pollutants contained in storm water. (Howard Jarvis Taxpayers Association v. City of Salinas (2002) 98 Cal.App.4th 1351.)

In the Salinas case, the court reviewed a storm water management utility fee adopted by the Salinas City Council to implement the requirements of the Federal Clean Water Act. (33 U.S.C. § 1251, et seq.; 40 C.F.R. § 122.269(a), et seq.).) The court held that this fee was a property-related fee that violated Article XIIIB, § 6, subdivision C, of the California Constitution because it had not been approved by a majority vote of the affected property owner or a two-thirds vote of the residents of the electors. In applying Proposition 218, the "Right to Vote On Taxes Act", the court found that the exception for the voter approval requirements for "sewer" and "water" service did not apply to storm water clean up programs. Therefore, the City of Salinas was required to seek a vote of the people prior to

implementing its fee program intended to pay for meeting the federal clean water requirements.

The Salinas case demonstrates that storm water fees imposed by local government could be considered subject to voter approval requirements. The language of the state mandate exception requires that the local government have "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (Government Code § 17556(d).) Proposition 218 has, based on the Salinas ruling, eliminated the ability of local government to pay for the total costs of the Permit program by imposing fees.

In these circumstances, it is important that the Court delineate, with as much specificity as possible, which portions of the Permit are State-mandated requirements and which are federally mandated. Obviously, this is important in the context of CEQA under the Petitioners' State Water Code claims. It is also important in terms of the fiscal aspects of the Permit program. The parties can use the Court's order as a guide to determine what cost sharing arrangements should be developed to implement the Permit. The Court's delineation of CEQA issues can prevent future litigation that might arise from the possible issuance of a writ.

**B. Issuance of a Writ on regulatory grounds would have significant impacts on application of the permit to local government.**

In order to fashion an appropriate remedy for the environmental claims, the Court would have to delineate those issues that may require environmental assessment and those which do not. There are several issues that fall into this category. Each of these issues has been raised by the Petitioners and is potentially subject to the issuance of a writ by this Court. The delineation of those State-mandated issues by the Court will also assist the parties in cost allocation for the Permit program.

Petitioners discuss the issue of federal versus state mandates in detail in their Opening Brief, at 11:11-19:3. They assert that federal law requires that municipal stormwater discharges be regulated based on a Maximum Extent Practicable standard. They assert both

that any more stringent requirements are based solely on state law and require CEQA review, and that states may not impose more stringent requirements on municipal stormwater discharges and programs, even if the state reimburses local government costs.

Petitioners base their position on the clear differences in federal law between the special narrative requirements set out for municipal stormwater discharges at 33 U.S.C. § 1342(p)(3)(B), and the baseline statutory requirements applied to industrial (including construction and perhaps commercial) stormwater discharges by reference at 33 U.S.C. § 1342(p)(3)(A)). Petitioners also reconcile their interpretation of these statutory provisions with relevant case law, including recent Ninth Circuit rulings.

If Petitioners are correct, then municipal governments cannot be required to implement any programs, or to impose any requirements on third parties, that are not "practicable." In addition, municipalities could not be penalized based solely on receiving water quality impacts if municipal stormwater discharges contributed to water quality problems.

Petitioners identify a large number of permit requirements that appear to them to go beyond what is mandated by federal law. Four sets of requirements that may exceed federal mandates or that may be inconsistent with federal or state law are discussed briefly below. These are the sets of requirements that Responding Copermittees anticipate it would be most difficult for the Copermittees and the State and Regional Boards to work out on remand, absent specific guidance from this Court.

**1. Land Use Authority—General Plan provisions**

Federal regulations state that municipal programs put in place to meet NPDES permit requirements for municipal stormwater discharges should include "planning procedures including a master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment." (40 C.F.R. section 122.26(d)(2)(iv)(A)(2).)

Based on these federal regulations, it is inevitable and appropriate that the permit would include some provisions related to land use planning and local "master plans." However, Petitioners' claim that the Permit goes too far, based in part on state law, and that the Regional Board has exceeded its authority by unlawfully intruding into local land use authority.

The California Constitution gives counties and cities the powers to "make and enforce within (their) limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." (Cal. Const. Art. XI, § 7; Petitioners' Opening Brief 24: 10-26:2.) State general law, at Government Code § 65302, defines what must be in a local General Plan: the seven mandatory elements of a General Plan are elements addressing land use, circulation, housing, conservation, open space, noise and safety.

The Permit requires that each city and the County amend its General Plan. The relevant provision states as follows:

> Each Copermittee's General Plan ... shall include water quality and watershed protection principles and policies to direct land-use decisions and require implementation of consistent water quality protection measures for development projects. (Permit § F.1.a.)

This requirement could be interpreted to require the addition of new elements to the General Plan, over and above those specified in the Government Code. Some state agencies have been given power by the Legislature to ensure that local general plans meet certain additional requirements. For example, the Legislature has delegated authority to the California Coastal Commission to place coastal access requirements in local General Plans. (Public Resources Code § 30500(a).) The Coastal Act requires submission and approval of land use plans, including the Land Use Element of each local jurisdiction's General Plan. (Public Resources Code § 30180.6.) There are no similar provisions in the Water Code granting the State Board or Regional Board jurisdiction over the General Plans of the Real Parties.

This situation places two issues before the Court. First, do the specific general plan provisions of the permit exceed the federal mandate that municipalities discharging stormwater under an NPDES permit have appropriate "planning procedures including a general plan" in place? If so, the CEQA and state mandate issues discussed previously come into play again.

A second question is whether the Regional Board has authority under the state constitutional and statutory provisions cited above to require that local General Plans be amended in a particular manner. If the Court concludes that the Regional Board may not intrude on local land use authority to this degree, it could declare this provision unconstitutional, mandating the Respondents to remove the General Plan requirements from any subsequent Permit issued. Some other means would need to be found to ensure that local stormwater programs met the baseline planning requirements set out in federal regulations.[8]

In all of these scenarios, a remand to the RWQCB should require that General Plan issues be included in any CEQA environmental assessment the Court might order. A clarification of the issue regarding the propriety of Board-imposed General Plan requirements would assist the parties in their future dealings and prevent potential future litigation, in addition to clarifying the scope of any required environmental documentation and future cost recovery claims.

**2. Land Use Authority—Special "SUSMP" Requirements**

The permit requires Copermittees to imposes additional and distinct regulatory requirements on a defined set of "priority" land development and redevelopment projects. These additional requirements are implemented through a "Standard Urban Stormwater Mitigation Plan" or "SUSMP" that the Copermittees have been required to prepare. The

[8] For example, a Regional Board finding that this federal requirement had been met, could be substituted for a Regional Board mandate. Or, the legislature could amend the Public Resources Code.

SUSMP is a template for implementation of these additional requirements through local ordinances and/or through local permitting policies and programs.

Under the permit and the SUSMP, these priority projects must use "treatment control" best management practices (BMPs) to treat storm water. All other projects and activities addressed in the permit can instead use other combinations of control measures, e.g., they can rely instead on effective and practicable measures to prevent the pollution of storm water. The permit further requires that these mandatory treatment control BMPs be of a certain size (with respect to volume or flow capacity) based on rainfall records. Finally, the requirement for treatment control BMPs of a specified size is not tied to a "maximum extent practicable" standard, but is mandatory unless the use of treatment control BMPs is "infeasible."

Petitioners have a significant interest in the land development process. They assert that the application of an "infeasibility" standard to controls for land development projects is both inconsistent with the "maximum extent practicable" standard of federal law, and in excess of federal mandates. Petitioners have been willing to expend substantial resources to put this issue before the Court. To reduce the potential for future litigation over a revised permit, the Real Parties filing this brief request that the Court clearly resolve two questions related to the SUSMP requirements of the permit: First, are these requirements prohibited because they are inconsistent with the "maximum extent practicable" limitations that Petitioners assert are imposed by federal law? Second, if the requirements are not prohibited, are they in excess of federal mandates? As is the case for the other issues identified in this section, the Court's resolution of these questions could affect whether SUSMP requirements are retained in a revised permit, and if they are retained which level of government must fund programs to impose and enforce those requirements.

///

///

///

///

///

### 3. Water Quality-Based Permit Requirements

A second set of important requirements in the permit is requirements that are tied to water quality outcomes in receiving waters.[9] The most obvious of these requirements are absolute and unqualified water-quality based discharge prohibitions in the permit. (Permit §§ A.2, C.1.) These requirements are an overlay to the detailed requirements in the permit that particular regulatory programs be implemented, and that particular types and sizes of control measures be put in place.

If Petitioners are correct, then municipal governments cannot be required to implement any programs, or to impose any requirements on third parties, that are not "practicable." In addition, municipalities could not be penalized based solely on receiving water quality impacts if municipal stormwater discharges contributed to water quality problems. If the Court agrees with Petitioners that requirements of this kind are prohibited, the Court should clearly identify which provisions of the permit must be rescinded.

If the Court determines that the water-quality based provisions of the permit are not prohibited, but are state mandates, the affected provisions should again be identified. As discussed in section III above these determinations could affect the scope of any CEQA review, whether the state is required to bear the cost of implementing these requirements, and whether these requirements would be retained in a revised permit. By addressing this question now, the Court would help with the transition to a revised permit and revised local programs. The Court could possibly prevent future litigation regarding a revised permit, or regarding allocation of the cost burden for some programs.

///

///

---

[9] Potentially relevant water quality reference points include both the narrative and numerical water quality objectives set out in the Basin Plan for San Diego, the beneficial uses set out in that Basin Plan, and state statutory provisions that prohibit discharges that create conditions of "pollution" or "contamination." State law defines those terms with reference, in part, to water quality impacts. (Water Code § 13050.)

### 4. Soil Erosion Categorized as a "Pollutant"

Another significant area of CEQA cost burden is the soil erosion requirements of the permit. The Petitioners have challenged whether the Regional Board can regulate downstream erosion as a "pollutant" (Petitioners' Opening Brief 29:9-30:17). The downstream erosion issue may give rise to environmental impacts that may need to be assessed. In addition, each jurisdiction will have to take measures to deal with downstream erosion and expend revenues in doing so. For that reason, if the Court finds in favor of Petitioners on this issue, there should be specific findings as to whether these measures exceed federal law for CEQA and cost allocation purposes.

### C. If a Writ is issued, there is a need for specific findings.

Overall, the issues raised by these responding Real Parties in Interest address concerns as to the aftermath of any ruling in favor of Petitioners. One of the main thrusts of Petitioners' writ is the legal foundation of individual requirements in the permit. If the Permit is founded on federal legal authority, certain exemptions, both environmental and fiscal apply. If it is based on State Water Code authority, the Regional Board has the duty to environmentally assess the impacts of its permit, and may be compelled to determine whether program elements can be paid for by the state as state-mandated programs. Petitioners' challenge raises many specific implementation issues that this Court should address. The cost allocation issues are important because of the consequences of a violation of water quality standards. If the Copermittees implement the program as established in the permit, they can still be subject to fines for water quality standard violations even if they implement every element of the Permit. The application or non-application of federal law to justify the requirements of the Permit is of critical importance to each Copermittee. The cost of meeting the water quality-based requirements of the permit, if based on state law, may be borne by the State. The extent to which the Regional Board can implement its order through either federal or state mandates affects every resident of the County of San Diego.

///

///

## V.

## CONCLUSION

If this Court issues a writ invalidating the permit, the Copermittees will still need to have authority to operate their storm sewer systems. For that reason, the Responding Copermittees respectfully request that the Court clearly provide for the continued applicability of some NPDES permit to municipal stormwater discharges, and that the Court clearly identify the transitional permit terms that will be applicable to those discharges until a new permit is issued. This will allow storm sewers throughout San Diego County to continue to operate.

Responding Copermittees also request that the Court state that local stormwater programs can either be left intact, or can be modified to conform to interim permit terms, pending issuance of a new permit. Local stormwater programs are not based on powers delegated from the Regional Board in the current permit, but are instead based on local government police powers. Some Copermittees may choose to leave in place requirements they have already adopted. Others may choose to modify some program elements that can be modified based on the ruling of this Court. We request that the Court make it clear that each Copermittee has the discretion to make these decisions.

If CEQA is found to have been violated, Responding Copermittees request that this Court direct the Regional Board to act as the Lead Agency to assess those environmental impacts identified by the Court as needing analysis as part of the CEQA process. Further, the Responding Copermittees request findings identifying each issue requiring environmental assessment, to give the Regional Board appropriate direction on remand. The Copermittees would act as Responsible Agencies and cooperate with the Regional Board in the environmental process. However, as the State agency primarily responsible for the issuance of any revised permit, the cost of environmental documentation should be considered a State obligation. (Public Resources Code § 21106.)

Petitioners have challenged the water quality-based requirements of the permit as exceeding Respondents' authority under the Clean Water Act. If the Court rules that these

requirements cannot be applied to municipal users, we ask the Court to delete all inconsistent provisions of the permit beginning with water quality based discharge prohibitions, but also including program-linked water quality provisions and the provisions of the permit that would impose penalties for water quality violations.

Finally, we ask that this Court specify the permit conditions that still remain valid despite Petitioners' challenges. If portions of the Permit are declared invalid and others are not, specific findings would assist each city in determining how to shape their programs while the Court retains jurisdiction.

DATED: December 16, 2002

Respectfully submitted,

McDOUGAL, LOVE, ECKIS, SMITH & BOEHMER

By _____
JAMES P. LOUGH
Attorneys for Real Parties In Interest, CITY OF CHULA VISTA, CITY OF CORONADO, CITY OF DEL MAR, CITY OF EL CAJON, CITY OF IMPERIAL BEACH, CITY OF POWAY, and CITY OF SOLANA BEACH

CITY OF CARLSBAD

By _____
RONALD R. BALL
Attorney for Real Party in Interest, CITY OF CARLSBAD

COUNTY OF SAN DIEGO
JOHN J. SANSONE, County Counsel

By _____
RODNEY F. LORANG, Senior Deputy
Attorney for Real Party in Interest, COUNTY OF SAN DIEGO